

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

vs.

GALE NORTON, Secretary of
the Interior, et al.,

Defendants.

Case No. 1:96CV01285
(Judge Lamberth)

**DEPARTMENT OF THE INTERIOR'S RESPONSE
TO THE SECOND REPORT OF THE COURT MONITOR**

In the view of the Department of the Interior ("Interior"), serious challenges remain in the design and implementation of the Trust Asset and Accounting Management System ("TAAMS"). As discussed below, Interior is taking steps to improve the management of the TAAMS project. Interior also recognizes that the Court Monitor's Second Report expresses concerns regarding the past conduct of a number of individuals and the forthrightness with which reporting was made to the Court. Interior takes these concerns very seriously. As a result, among other remedial actions, the newly confirmed Solicitor recently referred the Court Monitor's report to the Inspector General of the Department of the Interior for review and recommended action.

A. Interior Is Taking Action to Improve the Management of TAAMS.

Interior agrees with the Court Monitor and the Special Trustee regarding the need for better oversight and management of the TAAMS sub-project of trust reform. As a first step, the Secretary has given the Special Trustee the required authority to more directly and forcefully

oversee the implementation of trust reform. In particular, on July 10, 2001, after consultation with the Court Monitor, the Secretary delegated additional authority to the Special Trustee for American Indians to "clarify that the Special Trustee is in charge of trust reform" and to "ensure his capacity to implement trust reform." Secretarial Order No. 3232 (Exhibit 1); Memorandum from Secretary Norton to Special Trustee, et al. (Exhibit 2). Recognizing the need for independent evaluation of the progress of trust reform, the Secretary directed the Special Trustee to hire a management consulting firm "to provide a comprehensive independent assessment of the efficacy of the Department's trust reform efforts to date."¹ Id. (Exhibit 2).

In addition, the Secretarial Order gave the Special Trustee the authority, after consultation with the head of any bureau or office, to issue written directives detailing necessary changes in any policy or practice that has hindered or may hinder trust reform. The Special Trustee's actions shall have the force and effect of a Secretary's Order unless the Secretary disapproves the directive in writing within 30 days of issuance. Through this, and the other provisions of Secretarial Order 3232, the Secretary has equipped Interior with some significant tools for enhancing the Department's ability to ensure that trust reform proceeds expeditiously and effectively.

¹Within 120 days of engagement the management consulting firm will be required to "issue to the Secretary, the Special Trustee, and the Assistant Secretary - Indian Affairs a report regarding the efficacy of the entire High Level Implementation Plan and each of the four court-identified breaches. As a result of this independent assessment, [the Secretary] want[s] to be assured that all of the subprojects are moving forward in a coordinated fashion and that each subproject is being managed in a way that assures the overall success of trust reform. Where such assurances cannot be made, [the Secretary] want[s] the firm to provide specific recommendations that the Department can use to make necessary changes." Id.

In addition, the Office of the Special Trustee has appointed Donna Erwin to fill the newly created position of Executive Director for Trust Systems and Projects. Ms. Erwin was the project manager for the Trust Funds Accounting System ("TFAS") and brings substantial management and trust experience to this new position. Ms. Erwin will focus her initial efforts on the management and oversight of the TAAMS project.

Interior has also hired Electronic Data Systems to provide an independent analysis of the TAAMS project and associated data-cleanup efforts. The company is expected to provide its preliminary comments in September 2001. This independent investigation will provide the external analysis needed to provide an objective review of the status of TAAMS as the Department considers how to redirect the TAAMS project.

Electronic Data Systems Corporation will also conduct a comprehensive assessment of the progress, project coordination, and direction for all of the High Level Implementation Plan sub-projects. Electronic Data Systems is expected to produce its overall assessment report by mid-December 2001.

B. Interior Has Taken Steps to Address Allegations of Past Misconduct and to Improve Future Reports to the Court.

Interior acknowledges the concerns the Court Monitor has expressed about the forthrightness of the information provided to the Court regarding TAAMS. In recognition of the serious nature of the Court Monitor's concerns, on August 17, 2001, the Solicitor referred several matters to Interior's Inspector General regarding both the First and Second Reports of the Court Monitor and requested that the Inspector General conduct an investigation and make appropriate

recommendations.² The Solicitor stated that it "is incumbent upon [the Department] to assure that all such allegations are investigated, and appropriate action taken based on the results of the investigation, including a report thereon to the court." Memorandum from Solicitor to Inspector General (Exhibit 3).³

Additional steps may be necessary to ensure the most effective and appropriate trust reform and reporting process. Towards that end, the Department expects to work closely with the Court Monitor to examine the format, content, and review process for the Quarterly Report.

C. Conclusion

In sum, Interior acknowledges that additional oversight and management are required to ensure the success of trust reform. The Department has taken concrete steps to address that need, including the delegation and clarification of the Special Trustee's authority and the creation of a new executive position dedicated to the oversight of trust reform. Perhaps most importantly, the Solicitor has taken the important step of referring several matters to the independent Inspector General. In addition, Interior is working on improving the reports provided to the Court and

²During the pendency of the Inspector General's investigation, certain attorneys within the Solicitor's Office have also been recused from future decision-making related to the Cobell litigation. The exact scope of this recusal is currently being defined and Interior anticipates forwarding the formal recusal decision to the Court in the near future.

³In light of the numerous factual disputes among the witnesses, and in order to ensure appropriate process is provided to all involved individuals, Interior does not at this time undertake to rebut or discuss the individual factual findings of the Court Monitor. By not addressing each witness statement and factual statement, Interior does not waive for itself or any individual employee or counsel the right to challenge the factual assertions contained in the Report after any investigation by the Inspector General has been completed or should further proceedings arise. See Order of Reference at 2, ¶ 5 (providing that "[i]n any proceeding before this Court, . . . findings of fact [contained in the Report] shall be reviewed de novo.").

expects additional steps in that regard to be developed and implemented, including exploring all potential options regarding greater involvement in that process by the Court Monitor.

Dated: August 23, 2001

Respectfully submitted,

JOHN C. CRUDEN
Acting Assistant Attorney General



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CERTIFICATE OF SERVICE

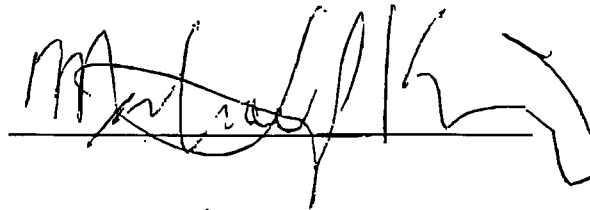
The undersigned hereby certifies that on August 23, 2001, a copy of the foregoing
**DEPARTMENT OF THE INTERIOR'S RESPONSE TO THE SECOND REPORT OF
THE COURT MONITOR**, was served on the following counsel by placing a copy in the United
States mail, first-class postage prepaid, addressed as follows:

Dennis M. Gingold, Esq.
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A handwritten signature, likely of Mark K. Brown, is written over a horizontal line. The signature is stylized and cursive.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

ORDER NO. 3232

Subject: Trust Reform

Sec. 1 Purpose. This Order delegates additional authority to the Special Trustee for American Indians to implement trust reform within the Department of the Interior.

Sec.2 Authority. This Order is issued in accordance with the American Indian Trust Fund Management Reform Act of 1994 (Trust Reform Act), Public Law 103-412, codified as 25 U.S.C. 161 a, 162 a and 4001, et seq., and Section 2 of the Reorganization Plan No.3 of 1950 (Reorganization Plan), as amended (64 Stat. 1262), 5 U.S.C. App.

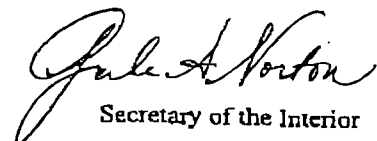
Sec.3 Definition. For the purposes of this Order trust reform is all activity associated with the subprojects identified in the February 29, 2000, Revised and Updated High Level Implementation Plan (HLIP) and the plans that address the following four breaches of trust identified in *Cobell v. Norton*: Computer and Business Systems Architecture Framework, Collection of Missing Information from Outside Sources, Retention of IIM-Related Trust Documents, and Workforce Planning. Trust reform also includes all activity associated with subsequent additions or revisions to the HLIP or breaches plans and all other reforms necessary for the proper discharge of the Secretary's trust responsibilities to Indian tribes and Indian individuals.

Sec. 4 Delegations. In addition to the authority vested in the Special Trustee by the Trust Reform Act, the Special Trustee is delegated the following authority to implement trust reform within the Department:

- a. If, after consultation with the head of any bureau or office of the Department, the Special Trustee determines that any policy or practice that is within the control of such bureau or office either hinders or may hinder trust reform, the Special Trustee, with the advice and counsel of the Solicitor's Office, may issue written directives detailing the appropriate change in policy or practice. Unless the Secretary disapproves such directive in writing within 30 days of issuance, the directive of the Special Trustee shall have the force and effect of a Secretary's Order .
- b. The Special Trustee, with the assistance of the Office of the Assistant Secretary - Policy, Management and Budget, shall provide to the heads of all bureaus and offices of the Department, language regarding trust reform for inclusion in the annual performance plans of employees of the Department who are engaged in trust reform.
- c. The Special Trustee may provide, as he/she deems appropriate, comments and/or recommendations to be considered by the heads of all bureaus and offices of the Department for inclusion in the regular performance reviews of employees of the Department who are engaged in trust reform.

Sec. 5 Expiration Date. This Order is effective immediately. It will remain in effect until the provisions are converted to the Departmental Manual, or until it is amended, superseded, or revoked, whichever occurs first. In the absence of any of the foregoing actions, the provisions of this Order will terminate and be considered obsolete on July 1, 2002.

Date: JUL 10 2001


Secretary of the Interior



THE SECRETARY OF THE INTERIOR

WASHINGTON

JUL 10 2001

Memorandum

To:

Special Trustee for American Indians
Assistant Secretary -Indian Affairs
Assistant Secretary -Land and Minerals Management
Assistant Secretary -Water and Science
Assistant Secretary -Policy, Management and Budget Solicitor

From: Secretary

Subject: Action regarding Trust Reform and Historical Accounting

Soon after I arrived at the Department of the Interior, I was given initial briefings on the status of trust reform. Upon further examination of these issues, it is clear to me that we must act to ensure that trust reform is proceeding at an appropriate pace, and that the Department is on track to meet its fiduciary duties to Indian beneficiaries. Today, I am issuing two Secretary's Orders and am directing that certain actions be taken in the near term.

Trust Reform

Many Departmental employees are working hard to make trust reform a reality. Some of these employees have expressed frustration and concerns about some aspects of trust reform, including the need for clarity with regard to ultimate management responsibility for trust reform.

One issue that I can address immediately is to clarify that the Special Trustee is in charge of trust reform. Toward that end, I have today issued a Secretary's Order that delegates additional authority to the Special Trustee to ensure his capacity to implement trust reform. I will look to and rely upon the Special Trustee to oversee and guide the successful completion of the High Level Implementation "Plan, the plans to resolve the four breaches of trust identified in *Cobell v. Norton*, and any subsequent revision, amendments or other changes to those plans. Consistent with the spirit of the Trust Reform Act, I will also rely upon the Special Trustee to provide me with specific recommended reforms necessary for the proper discharge of my trust responsibilities to Indian tribes and individuals. This Secretary's Order is not intended, however, to alter the manner in which trust reform projects are currently staffed. Each bureau and office within the Department that is currently responsible for implementing trust reform initiatives continues to be assigned those tasks.

Second, while I believe that the Special Trustee is fulfilling his mandate to oversee trust reform, I believe that the Department would benefit from an independent assessment of the progress that has been made and of the challenges yet to come. Consequently, I am directing that the Special Trustee, within the next 30 days, provide me with a plan for hiring a management consulting firm to provide a comprehensive independent assessment of the efficacy of the Department's trust reform efforts to date. The Special Trustee's plan shall incorporate the requirement that the management consultant, within 120 days of engagement, issue to the Secretary, the Special Trustee, and the Assistant Secretary -Indian Affairs a report regarding the efficacy of the entire High Level Implementation Plan and each of the four

court-identified breaches. As a result of this independent assessment, I want to be assured that all of the subprojects are moving forward in a coordinated fashion and that each subproject is being managed in a way that assures the overall success of trust reform. Where such assurances cannot be made, I want the firm to provide specific recommendations that the Department can use to make necessary changes.

Historical Accounting

It is clear that while the D.C. Circuit Court reiterated our duty to complete a historical accounting, it nevertheless left it in my discretion to design a method for the historical accounting that meets our fiduciary duties. The Court and the Congress are looking to the Department to define the precise method by which we conduct a historical accounting.

I agree with the Court that an accounting to the IIM beneficiaries is long overdue. I understand, however, that the development and implementation of a satisfactory accounting is an enormous project that will take considerable time at substantial expense. I also understand that the time and money necessary to complete the project itself may be important factors in the decisions about how to proceed. However, I want to be clear that the Department is charged with a historic mission in which success is the only option. I will not accept that this is a job too big for us to accomplish. It may take time, but the historical accounting must be completed.

The next step in this process is to develop a comprehensive plan for the historical accounting. Although myriad accounting approaches may be employed in some form and to some degree in this endeavor, it is imperative that the Department's approach satisfies our obligation to account and that the methods used to meet that goal meet appropriate fiduciary standards.

Therefore, to insure that we begin this comprehensive planning process promptly but at the same time have the necessary information for due deliberation, I have today issued a Secretary's Order creating the Office of Historical Trust Accounting. This office will be headed by an Executive Director under the direction of my office and may include staff representatives of the bureaus and offices of the Department that have responsibility for maintaining records that evidence the historical administrative management of Indian trust assets. This office will be responsible for planning and completing the historical accounting. Specifically, the Secretary's Order directs the Office of Historical Trust Accounting to begin its work by completing the following steps:

1. Within the next 60 days, prepare a description and timetable for completion of all steps that are needed to staff and develop a comprehensive plan for the historical accounting that meets our fiduciary obligations to IIM beneficiaries. This timetable shall include schedules for the retention of one or more outside contractors to assist the Department with the management and the development of this comprehensive plan and the attendant implementation costs. Through this comprehensive plan, the Department will analyze all options, not just statistical sampling, so that we can demonstrate to Congress, the Court, IIM beneficiaries and the public that we have identified the most cost-effective plan to complete the historical accounting and thereby satisfy the Department's fiduciary duty.
2. Because the proper development of a comprehensive plan for the historical accounting of IIM accounts is likely to take a significant amount of time, the Department must identify any portions of the historical accounting work that can begin without compromising the development of a comprehensive plan. The Office of Historical Trust Accounting is directed, within the next 120 days, to identify preliminary work that can be done in advance of a comprehensive plan.

Conclusion

My actions today, through this memorandum and the two Secretary's Orders, are meant to signal my unequivocal commitment to ensuring the progress of effective trust reform and to advance the Departmental responsibility to provide a historical accounting to IIM beneficiaries. Our efforts will *only* succeed if they receive the direct participation and full cooperation of all of the affected offices and bureaus. I know that I can count on each of you to take every action necessary to assist me in the successful implementation of these priorities.



U.S. Department of Justice

Environment and Natural Resources Division

KJH:SDH

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August 21, 2001

BY HAND DELIVERY

The Honorable Royce C. Lamberth
United States District Judge
District of Columbia
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Re: Cobell v. Norton, No. 96-01285

Dear Judge Lamberth:

This letter is in further response to the Court's Memorandum Opinion issued on August 14, 2001 in Cobell v. Norton, No. 96-01285, with respect to the unsealing of certain Department of Treasury documents. In that Opinion, the Court noted that neither the Department of Justice nor the Department of the Interior "has provided any report whatsoever - under seal or otherwise - demonstrating that they have held any attorney accountable in any way whatsoever for any misconduct in this litigation."

The Department of the Interior has requested that I provide you with the enclosed materials, which refer to actions taken by the Department of the Interior with respect to allegations of misconduct in the Cobell matter.

I appreciate your attention to this matter.

Sincerely,

Sarah D. Himmelhoch

cc: Dennis Gingold, Esq. (by U.S. Mail, and by facsimile without enclosures)
Keith Harper, Esq. (by U.S. Mail)
Elliott Levitas, Esq. (by U.S. Mail)
Thaddeus Holt, Esq. (by U.S. Mail)
Sabrina A. McCarthy, Esq.
Brian Ferrell, Esq.



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

AUG 17 2001

Mr. John Cruden
Acting Assistant Attorney General
Environment and Natural Resources Division
Department of Justice
950 Pennsylvania Avenue, N.W.
Room 2143
Washington, DC 20530

Dear Mr. Cruden:

This is in response to the Court's Memorandum Opinion issued August 14, 2001, in *Cobell v. Norton*, No. 96-01285, with respect to the unsealing of certain Department of Treasury documents and other motions. In that Opinion, the Court noted that neither the Department of Justice nor the Department of the Interior "has provided any report whatsoever - under seal or otherwise - demonstrating that they have held any attorney accountable in any way whatsoever for any misconduct in this litigation." Memorandum Opinion, at 14 (Civil Action No. 96-01285 (RCL)).

I am writing to advise you that I have this day sent to the Inspector General for the Department of the Interior a referral of several allegations of possible misconduct by managers and/or attorneys of the Department. A copy of that referral is enclosed. The Inspector General advises me that his office is looking into the referral and will advise the Secretary, me, and others of his views and any action or recommendations he has on the matters listed therein.

You will note in my memorandum to the Inspector General that, during the previous administration, there were charges leveled against two attorneys in the Office of the Solicitor. One of those charges was investigated by the Inspector General, who found no support for the charge. The other charge was investigated by the Special Master in this case and the Special Master found no abrogation of the ethical duty not to file, knowing a false document with the Court. I understand that the Court was advised of the result both those investigations and I, therefore, did not refer them to the Inspector General; however, you will see from my memorandum to the Inspector General, I did bring to his attention.

The Inspector General and I have agreed to remain in contact with each other to work out any logistical questions on the referral and to expedite his review as reasonably as

possible. We will keep you advised of the actions taken by the Inspector General and actions taken by the Department relative to his recommendations. We request that you forward this letter to Judge Lamberth for his information.

Sincerely,

A handwritten signature in dark ink, appearing to read 'W. G. Myers III', with a long horizontal flourish extending to the right.

William G. Myers III
Solicitor

Enclosures



United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

August 17, 2001

Memorandum

To: Inspector General

From: Solicitor

Subject: Referral for Investigation and Recommendations

This referral involves the case of *Cobell, et al. v. Gale A. Norton, Secretary of the Interior, et al.* No. 96-01285 (D.D.C.) ("*Cobell*"). In recent weeks, the Department of the Interior ("Department") has received two reports by the Court Monitor appointed by the Court in *Cobell* (Memorandum Opinion, dated April 16, 2001), in which the Court Monitor finds fault with senior managers and attorneys of the Department. There may be instances other than the Court Monitor's two reports in which allegations have been made that senior managers and attorneys of the Department engaged in misconduct, which allegations have not been fully investigated. It is incumbent on us to assure that all such allegations are investigated, and appropriate action taken based on the results of the investigation, including a report thereon to the court.¹

Listed below are situations or documents in which such allegations are made and which may not have been investigated by the Department. I believe your office is the most appropriate office within the Department to investigate these matters.

1. Court's Opinion on Motion to Hold Secretary Babbitt in Contempt

In its Memorandum Opinion issued February 22, 1999, holding Secretary Babbitt and Assistant Secretary Gover in contempt, the court found that one attorney and several management officials for the Department failed to make a good faith effort to comply with the court's orders and failed to advise the court about self-inflicted obstacles to compliance. The attorney from Interior, Willa Perlmutter, was no lo-

¹In a Memorandum Opinion accompanying an order issued August 14, 2001, the court indicated that the Department has never provided it with a report demonstrating that Interior had "held any attorney accountable in any way whatsoever for any misconduct in this litigation." Memorandum Opinion, August 14, 2001, at 14. (Emphasis in original) (copy attached).

employed here at the time of the contempt trial. She had left the Department to work at a private law firm. We understand that the firm referred the Court's opinion to the bars of which Ms. Perlmutter is a member. We are unaware of the results of those referrals; however, the results of those referrals may inform whether further investigation of the Department's officials is warranted.

2. BIA Employee Situation

This matter involves the question of whether officials of the Department retaliated against an employee of the Bureau of Indian Affairs (in contravention of a non-retaliation order of the court) by ordering her reassignment with her office from Albuquerque, NM to Reston, VA. The plaintiffs in *Cobell* filed a motion to show cause why nine officials of the Department should not be held in contempt for violation of the order. The Special Master looked into the allegations and has referred the matter to the court with a recommendation that the court hold a hearing on the motion. The Department of Justice is defending the Department in this situation. Your office presumably has not investigated this matter; however, attorneys from the Department of Justice and the Office of the Solicitor have interviewed the officials charged and other employees in preparation for the defense and thus may be able to provide your office information on the matter.

3. Court Monitor's First Report (on historical accounting)

In his First Report to the court (dated July 11, 2001), the Court Monitor concludes that the Department has not carried out an historical accounting of the trust money held by the United States for the plaintiffs in compliance with the court's December 21, 1999, decision on the June trial of *Cobell*. He further found that the decision of Secretary Babbitt to do a sampling was not based on the Federal Register notice process the Department undertook to assist in the decision nor on any research leading to the decision. Finally, he found that the new administration did not conduct an adequate review of Secretary Babbitt's decision. He concludes that much of the delay and uninformed decision making was due to high level officials of the Department focusing on the litigation posture of the Department, rather than the need to do a complete accounting.

4. Court Monitor's Second Report (on TAAMS)

In his Second Report to the court (dated August 9, 2001), the Court Monitor outlines his findings relative to the Trust Asset and Accounting Management System (TAAMS) of the Bureau of Indian Affairs. TAAMS is an important part of the Department's efforts to implement trust reform under the Indian Trust Reform Act of 1994. The Court Monitor concludes that senior managers of the Department and lawyers in my office provided misleading information to the Court and have "created a record of opposition to and actions against the provision of open and honest

communication to [the Court]". See generally Second Report, pp. 73-129, and specifically fn. 35, at 127.

5. Electronic Message Retention and Production Opinion by the Special Master

The Special Master recently issued an opinion (filed on July 30, 2001) in which he indicated that, in addition to the Office of the Solicitor, the Department should have been saving tapes on which electronic messages are backed up, rather than writing over them. He found that the electronic versions of the messages contain information not on the printed version. He also opined that the Department should have been reviewing the tapes and producing the information on those tapes as part of discovery in *Cobell*. We believe his opinion may imply that the Department has failed in a duty to retain and produce records in accord with discovery requests by the plaintiffs. While much of his opinion centers around the Office of the Solicitor, it implicates all offices with records or information pertaining to *Cobell*, trust assets, or trust reform.

6. Information Technology (IT) Security Investigation by the Special Master

The Special Master has not issued an opinion or report in this investigation, but he has indicated his displeasure with the state of IT security, including complaints that the Department is frustrating efforts of a contractor to provide him with information about the security of the records system.

7. Other Information

As an added note, we are aware of two instances in which there were investigations of allegations against attorneys in the Department. Those are designated situation A and situation B. Situation A involved an allegation that the Deputy Solicitor ordered an attorney in the Office of the Solicitor to destroy documents related to *Cobell*. Your office investigated those allegations and found them totally unsupported. I understand the your report was filed with the court. Situation B was an allegation that a staff attorney in the Office of the Solicitor had structured a declaration signed by an employee of the Bureau of Indian Affairs such that it was untrue. The Special Master in *Cobell* investigated this matter and reported that, while the staff attorney had not acted improperly, the Special Master was troubled by the fact that the staff attorney might not have supplied the employee with a copy of the court's order prior to consulting with her on the substance of her declaration and that the declaration may have been written before the staff attorney had inquired as to the employee's knowledge of one paragraph in the declaration.

I am referring these matters to you with a request that you review them, investigate them as you deem necessary, and advise the Secretary, the Special Trustee for American Indians, the Assistant Secretary for Indian Affairs, and me of your findings and any recommendations you believe appropriate. While time is of the essence, production of an

accurate and complete report is also essential. Should you need background or other information about the case, please feel free to call me at (202) 208-4423. If any other instances with similar allegations arise, I will advise you.

Attached are documents relevant to the above situations. I am available to discuss this referral and any parts thereof at your convenience. Thank you for your assistance in this important matter.

Attachments

cc: Secretary
Special Trustee
Assistant Secretary - Indian Affairs

bcc: Jim Cason
Michael Rossetti